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In The

Supreme Court of the United States

October Term, 1961

No. 446

Marvin Dayan, known as Marvin Dayon,

Petitioner,

vs.

The People of the State of California,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

I.

Statement.

Petitioner was arraigned in the Municipal Court of Los Angeles Judicial District on a four count complaint charging three violations of Section 2141 of the Business and Professions Code of the State of California and one violation of Section 4143 of the same code [R. 77]. On November 2, 1959, a jury returned a verdict of guilty of the three counts of violating Section 2141 of the Business and Professions Code.

Appellant's conviction was affirmed by the Appellate Department of the Superior Court of the State of California on March 2, 1960 [R. 40, 41], and a Petition

for Rehearing was denied on March 14, 1960 [R. 42, 43].

Petitions for Writs of Habeas Corpus urging the same constitutional issues as are being raised in the instant case were filed in the District Court of Appeal of the State of California [R. 23], and in the Supreme Court of the State of California [R. 15] and both were denied.

Petitioner's petition for Habeas Corpus was then filed in the United States District Court, Southern District of California, and was dismissed by that court on April 29, 1960 [R. 68].

Petitioner subsequently sought two separate Writs of Certiorari in the United States Supreme Court, one to review the judgment of the Appellate Department of the Superior Court of California and the other the California Supreme Court's denial of a Writ of Habeas Corpus. Both such writs urged the same constitutional issues that comprise the instant petition and on October 10, 1960, both writs were denied. (No. 142, *Marvin Dayon v. California,* 5 L. Ed. 2d 48; No. 194, *Marvin Dayon v. California,* 5 L. Ed. 2d 51.)

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's judgment of dismissal July 24, 1961, and denied a rehearing (Petition, App. A). The petitioner now, for the third time, seeks a Writ of Certiorari in this Court.

II.

A Chiropractor May Be Validly Prosecuted Under Section 2141 of the Business and Professions Code of California.

1. The Pertinent Provisions and Statutes of California Law.

Section 2141 of the Business and Professions Code provides that:

> "Any person who practices or attempts to practice or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

The certificates provided in Chapter 5 to which Section 2141 refers, do not include those issued to chiropractors. The chiropractors are granted licenses under Division 2 of Chapter 2 of the Business and Professions Code.

The privilege of practicing the chiropractic arts in California emanates from an initiative, known as the Chiropractic Act, which was passed by California in 1922 (now codified—Sections 1000-1001, Division 2, Chapter 2, Business and Professions Code of the State of California).

The substantial language of Section 2141, under which the petitioner was prosecuted, is found under the Medical Practices Act as amended in 1917 (Stats.

1917, Ch. 81, p. 114—[Appendix A]) which preceded the Chiropractic initiative.

When called upon to interpret the effect of the Chiropractic Act upon this certain provision, Section 2141 of the Business and Professions Code (originally of the Medical Practices Act), the highest state court to hear such matters, the Appellate Department of the Superior Court, gave it the following construction:

> "The lack of such license is not stated by the last-mentioned act (or the code) as a part of the definition of the offense there denounced. The question of such a license enters into the case only by reason of the separate Chiropractic Act. No part of the language of the Medical Practice Act was expressly repealed, or removed or deleted from that act by the Chiropractic Act. . . . The operative effect of the Chiropractic Act is the same as that of an exception or limiting proviso placed in the same act with a prohibition but not made a part of the definition or description of the offense. . . ."
>
> *People v. Fowler*, 32 Cal. App. 2d Supp. 737, 742, 84 P. 2d 326.

As a matter of statutory construction the chiropractic license was held not to be a "license" under Section 2141. Furthermore, it was found that Section 2141 was not repealed by the Chiropractic Act.

The court recognized that the chiropractic license was a valid defense to Section 2141 for all acts properly authorized under the Chiropractic Act. For *ultra vires* acts, however, a chiropractor was answerable under Section 2141. (*People v. Fowler, supra; People v. Mangiagli*, 97 Cal. App. 2d Supp. 935, 938, 218 P. 2d 1025.)

The court determined what then was *ultra vires.* It found that chiropractic, as it was defined in 1922 and as taught in 1922, set the boundaries. (*People v. Fowler, supra; People v. Mangiagli, supra,* construing Secs. 1000-1007, Business and Professions Code of the State of California.)

Pertinent to the case at bar, it was found in the *Mangiagli* case, *supra,* that injections were a part of *materia medica* and that it was unlawful for a chiropractor to dispense them under Section 7, Chiropractic Act (Secs. 1000-1007, Business and Professions Code);[1] that they were simply beyond the authorized scope of this healing art, and that a chiropractor could be convicted therefor under Section 2141. (See also, *People v. Augusto,* 193 A. C. A. 254, 249.)

The District Court of Appeal, Second Appellate District, State of California, approved in a minute order the rule of law established by the *Fowler* and *Mangiagli cases.* (Crim. 6798, *In re Dayon on Habeas Corpus,* 172 A. C. A. No. 2, p. 5, of the Minutes (Appendix B).)

2. The State Court's Construction of State Statutes Is Binding Upon the Federal Courts.

(a) *It is a Basic Constitutional Principle That the Construction of a State's Statutes by Its Court of Last Resort Must Be Accepted by the Federal Courts.*

Williams v. Oklahoma, 358 U. S. 576, 3 L. Ed. 2d 516;

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[1]Inasmuch as injections are beyond the scope of a chiropractor's license, the trial court in *People v. Dayon,* No. 98050, held properly that evidence of the substance injected into the complaining witnesses was immaterial.

Farncourt v. Denver, 252 U. S. 7, 64 L. Ed 424;
Speiser v. Randall, 357 U. S. 513, 2 L. Ed. 2d 1460;
Albertson v. Millard, 345 U. S. 242, 97 L. Ed. 984.

The decision of the highest court of a state as to whether a statute has repealed the provisions of a former act is conclusive upon the federal courts.

Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97;
Kibbe v. Kibbe, 93 U. S. 674, 23 L. Ed. 1005;
Ughbanks v. Armstrong, 208 U. S. 481, 52 L. Ed. 582.

Whether one state statute excludes another, or both are to be construed together, is a matter of state law on which the decision of the state court is controlling on the federal courts.

Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270.

(b) *It Is the Province of the Courts of a Particular State to Determine What Its Laws Are, and to Determine Whether Particular Acts on the Part of an Alleged Offender Constitute a Crime Under Such Laws.*

Appleyard v. Massachusetts, 203 U. S. 222, 51 L. Ed. 161;
Howard v. Fleming, 191 U. S. 126, 48 L. Ed. 121;
Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28, 92 L. Ed. 455;
International Union etc. v. O'Brien, 339 U. S. 454, 94 L. Ed. 978.

III.

Section 2141, Business and Professions Code, Is Sufficiently Definite and Certain, and Therefore Is Not Repugnant to the Substantive Guarantees of the Due Process Clause of the Fourteenth Amendment.

In determining whether a statute is invalid on the ground of vagueness, the applicable standard is not one of wholly consistent academic definition of abstract terms; it is rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important.

> *American Communications Assn. v. Douds*, 339 U. S. 382, 94 L. Ed. 925.

The plain words of a statute must be given the meaning naturally attributable to them.

> *United States v. Resnick*, 299 U. S. 207, 81 L. Ed. 127.

Furthermore, the rule of strict construction of criminal statutes does not require that the narrowest technical meaning be given to the words employed, in disregard of their context, and in frustration of the obvious legislative interest.

> *United States v. Corbett*, 215 U. S. 233, 54 L. Ed. 594;
>
> *United States v. Bramblett*, 348 U. S. 503, 99 L. Ed. 594;
>
> *United States v. Turley*, 352 U. S. 407, 1 L. Ed. 2d 430.

The language used in similar statutes has been judicially condoned by the Supreme Court of the United States.

> ". . . any person shall be regarded as practicing medicine within the meaning of this act. . . . (2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any deformity or injury, by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation."
>
> *Collins v. Texas*, 223 U. S. 288, 56 L. Ed. 439.

A statute which permitted the State Board of Dental Examiners to revoke the license of any dentist for gross violations of professional duties or for incompetency, was held to be not so indefinite as to violate the due process clause.

> *State Dental Examiners v. Savelle*, 90 Colo. 177, 8 P. 2d 693, 82 A. L. R. 1176, Appeal dismissed: 287 U. S. 562, 77 L. Ed. 496.

The language of Section 2141 is a far cry from creating any disability in a reasonable man to discern whether or not the words used charge a public offense. The mandate is simple: Don't practice medicine without a license.

IV.

The Procedural Guarantees of Due Process Were Not Offended in the Trial of This Case.

1. Exclusion of Evidence at the Trial of Petitioner Is Not a Proper Issue to Be Considered by This Court.

The scope and meaning of a state statute, as indicated by the exclusion of evidence on the ground of its incompetency or immateriality under that statute, is conclusive on the federal courts in determining the question of validity of the statute under the federal constitution.

> *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643.

The reception or denial of evidence may be challenged on appeal but it cannot be used in a habeas corpus proceeding.

> *Eberhardt v. United States*, 262 F. 2d 421.

V.

The Application of Section 2141 of the Business and Professions Code of the State of California to the Petitioner Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

The mere fact that so-called drugless practitioners may currently escape prosecution under Section 2141 for *ultra vires* acts, does not give the chiropractor grounds to complain because he falls within its scope. A chiropractor has different rights, powers, privileges and immunities from the "drugless practitioner." He is governed by the results of an initiative election rather

than by an act of the Legislature. He is not accountable to the California Board of Medical Examiners, as are the so-called drugless practitioners.[2] He has limitations, as do mid-wives and chiropodists.

Furthermore, there is no right to practice chiropractic. It is a mere privilege that can be withdrawn by the People of California.

A statute is constitutional when it applies uniform rules of conduct for all those coming within the scope of its application and may not be challenged because of any denial of "equal protection of the law" to those on whom it operates, because others differently situated and within a different legal classification may not be affected by its terms.

> *People v. Sullivan* (1940), 60 Cal. App. 2d 539, 141 P. 2d 230.

There is no violation of equal protection where a legislative discrimination reflects the fact, in legislative beliefs, that evils in the same field are of different dimensions and proportions, requiring different remedies, or when the discrimination occurs as a consequence of reformative legislation which takes one step at a time and addresses itself to the phase of the problem which seems most acute to the legislative mind.

> *Williamson v. Lee Optical of Oklahoma*, 348 U. S. 483, 99 L. Ed. 563.

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[2] "Drugless Practitioners" were abolished in 1949 by Sec. 2232, Business & Professions Code (Stats. 1949, ch. 233, p. 458, sec. 5).

The deference due to the judgment of a state Legislature in the matter of statutory classification alleged to deny equal protection of the laws, is especially to be observed when local conditions, which the court cannot know, may affect the answer to the critical question of whether the court can say, on its judicial knowledge, that the Legislature could not have had any reasonable ground for believing that there were such public considerations as to justify the distinction made.

Dominion Hotel v. State of Arizona, 249 U. S. 265, 63 L. Ed. 597.

The Legislature is free to recognize degrees of harm; a law which hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied.

West Coast Hotel v. Parrish, 300 U. S. 379, 81 L. Ed. 703.

While the Constitution, in enjoining the legal protection of the laws upon states, precludes irrational discrimination as between persons and groups of persons in the incidence of a law, it does not require situations which are different in fact or opinion to be treated in law as though they are the same.

Goesaert v. Cleary, 335 U. S. 464, 93 L. Ed. 163.

VI.
Conclusion.

The Petition for Writ of Certiorari does not disclose a clear and convincing showing that there has been a violation of the petitioner's constitutional rights under the Federal Constitution. It represents merely a plaint of dissatisfaction with California judicial interpretation of its own law by a person whose license in the healing art exists solely by virtue of a privilege.

Petitioner's apparent desire as manifested by the allegations of his petition was succinctly disposed of years ago by Mr. Justice Holmes in *Collins v. Texas* (233 U. S. 288, 56 L. Ed. 439, 444), with the observation:

> "In short, the statute says that if you want to do what it calls practicing medicine, you must have gone to a reputable school of that kind of practice."

Respectfully submitted,

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APPENDIX A.

Section 17.

(Stats. 1917, Ch. 81, p. 114)

Any person who shall practice or attempt to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who shall diagnose, treat, operate for, or prescribe for, any disease, injury, deformity, or other mental or physical condition of any person, without having at the time of so doing a valid unrevoked certificate as provided in this act, or who shall in any sign or in any advertisement use the word "doctor," the letters or prefix "Dr.", the letters "M.D.", or any other term or letters indicating or implying that he is a doctor, physician, surgeon, or practitioner, under the terms of this or any other act, or that he is entitled to practice hereunder, or under any other law without having at the time of so doing a valid unrevoked certificate as provided in this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished as designated in this act.

APPENDIX B.

Minutes.

District Court of Appeal, State of California, Second Appellate District, Division One.

Los Angeles, July 30, 1959.

Crim. 6798—In re Dayan on Habeas Corpus.

The Court: Upon the authority and for the reasons stated in *People v. Fowler,* 32 Cal. App. 2d Supp. 737 and *People v. Mangiagli,* 97 Cal. App. 2d Supp. 935, the petition for writ of habeas corpus is denied.

WHITE, *P. J.*